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## ALIMONY WITHOUT DIVORCE.

IN THE greater number of jurisdictions of this country it is the law that alimony or separate maintenance will be awarded to a wife who has been deserted by her husband, independently of proceedings for divorce. Only a few years ago the books announced that the weight of authority was against the allowance of alimony or separate maintenance by independent suit. But the opposite view has come rapidly into favor. The weight of authority has clearly shifted.

A recent work, collecting the adjudicated cases, and announcing a text therefrom, says: "In the United States it is maintained, by much authority, that in the absence of legislation to the contrary, alimony should not be allowed in an independent suit in courts of equity. The proper remedy, at common law, where the husband deserted his wife and refused to supply her with necessaries according to her rank and condition, was by an action at law by the person supplying such necessaries for her. But in many of the States alimony may be decreed independently of any proceeding for separation or divorce where the husband refuses to support his wife, or where she has separated from him, on the ground that in the absence of adequate relief or remedy at law, equity will interfere. And in other States where the rule was formerly that an independent action would not lie, it is now held that such an action will lie although no statute authorizes it. The inherent right of equity to entertain an action for alimony apart from any proceedings for divorce is not taken away by a statute authorizing the granting of alimony in an action for divorce, nor by a statute making it a misdemeanor for a person wilfully to neglect to provide support for his wife."<sup>1</sup> Then, showing that the trend of legislation has followed the reason and justice of a suit for maintenance without divorce, the same text proceeds: "In nearly all the States where the authority of courts to award alimony independently of divorce

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<sup>1</sup> 3 Enc. L. & P. 65. But see 14 Cyc. 744.

was denied at common law, statutes now exist authorizing an independent action for alimony, with limitations in some instances; and in several jurisdictions where the common-law authority of equity courts to award alimony without divorce is recognized, statutes now exist which are declaratory of the common law. In other States, where the common law authority of courts to award alimony without divorce has not been passed upon, statutes exist authorizing the awarding of alimony in an independent action."<sup>2</sup>

Thus we observe that many courts and legislatures have recognized the rule that a wife deserted by her husband may compel him to provide her with alimony or separate maintenance, whether she seeks a divorce or not. In many places where the courts did not recognize such right in equity, the legislatures have by statute directed them to do so. But that equity, aside from statute, rightly has jurisdiction in the premises has been so forcefully presented that doubt should no longer be entertained.

After a Virginia chancellor, in the early case of *Purcell v. Purcell*,<sup>3</sup> had promulgated the doctrine that a court of equity, on the ground of inadequate remedy at law, may decree maintenance to a wife who has been deserted by her husband, Justice Story said of it: "There is so much good sense and reason in this doctrine that it might be wished that it were generally adopted."<sup>4</sup> The wish has indeed been fulfilled. In approving the doctrine a well-recognized text-writer has fully answered the caustic and scolding argument of Mr. Bishop against it.<sup>5</sup>

The following exposition from a new and excellent work, based

<sup>3</sup> 3 Enc. L. & P. 68.

<sup>4</sup> 4 H. & M. 507.

<sup>5</sup> 2 Story, Equity Jurisprudence, § 1423a.

<sup>6</sup> 2 Nelson, Divorce and Separation, § 1000. Some of the older decisions supporting it are: *Glover v. Glover*, 16 Ala. 440; *Galland v. Galland*, 38 Cal. 265; *Butler v. Butler*, 4 Litt. (Ky.) 202; *Garland v. Garland*, 50 Miss. 694; *Earle v. Earle*, 27 Neb. 277, 43 N. W. 118. The doctrine finds favor in new jurisdictions: *Bueter v. Bueter*, 1 S. D. 94, 45 N. W. 208; *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966; *Dole v. Gear*, 14 Hawaii 554. All the cases may be found by reference to Ann. Cas. 1913 D, 1132, 38 L. R. A. (N. S.) 950, 1 R. C. L. 878, 3 Enc. L. & P. 66, 2 Am. & Eng. Enc. Law 94, 14 Cyc. 744, 77 Am. St. Rep. 228.

on the decisions, is pertinent here: "Jurisdiction of an independent suit for alimony is based on the ground that such an action falls within the ordinary principle on which the jurisdiction of equity rests. That it does so fall is not open to dispute. Alimony was merely the method by which the spiritual courts of England enforced the husband's common law duty of maintaining his wife. Courts of law made a clumsy and circuitous attempt to enforce the same duty, by employing the fiction that a wife, living apart from her husband by reason of his fault, was his agent for the purpose of binding him to third persons for necessities furnished to her. That such cases were based on the duty of maintenance and not on the theory of agency is evident from the fact that even where the husband sought to revoke her authority in that respect, by giving notice forbidding any person to furnish her supplies, the common law nevertheless held him liable therefor. It will be observed, also, that where the wife was living apart from her husband it was always a proper inquiry whether she had just cause for so doing; and if she had not, that was a good defense to such a suit. It will thus be seen that alimony, although the creature of the ecclesiastical courts, was in fact a legal right of maintenance recognized by the common law. But though the common law recognizes the wife's right of maintenance under such circumstances and attempts to enforce it, the remedy thus afforded is inadequate in that the wife may not be able to obtain credit, and it also involves a multiplicity of suits in that each creditor of the wife would have to sue the husband separately; and as these are both familiar grounds of equitable jurisdiction it is clear that, even in the absence of statutory authorization, an independent suit for alimony is inherently within the jurisdiction of courts of equity."<sup>6</sup>

Mr. Bishop accuses those judges who did not agree with his insistence that equity, in the absence of statute, had no jurisdiction to award alimony or maintenance without divorce, of having abnegated the office of thinking and of having made our law to linger in the shadows of the dark ages.<sup>7</sup> But a comparison

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<sup>6</sup> 1 R. C. L. 880.

<sup>7</sup> 1 Bishop, Marriage, Divorce, and Separation, § 1393.

of the opinions of the judges with the text of the author convinces the impartial mind that the author himself was more nearly guilty of the charge of abnegation than were the judges. One proof of this is that the thinking of the judges has gathered wide support, while that of the author has been left to the minority. The courts have recognized an undisputed legal obligation resting on the husband for the support of his blameless wife, which common law remedies can not adequately enforce. Then, consistent with elemental principle, they have said that equity will take jurisdiction so as adequately to enforce the obligation. On the other hand, the author, closing his eyes to such practical thinking, mistakenly understood the courts to assume equitable jurisdiction merely because of the absence of ecclesiastical courts in this country. And he accused our courts of further blunder in not recognizing that the ecclesiastical courts of England had no such jurisdiction as he conceived was being taken over because of the absence of the ecclesiastical tribunals. But surely he did not maturely consider the reasoning of many cases which he cites. For jurisdiction in equity to award alimony without divorce has not been put by American courts on the grounds which he assumes. Basis for such jurisdiction has been found in the simple principle that equity will enforce a legal obligation in the absence of adequate legal remedy for its enforcement. But the celebrated author persisted throughout his argument in ignoring that principle. He asserted that the attempt to establish jurisdiction in equity for the award of alimony without divorce, in any State where it was not already maintained, would be of doubtful result "against an enlightened and competent argument in opposition." The jurisdiction has been declared in many States since the time of his writing. Truly it appears that his own insistent argument has not proved an "enlightened and competent" one.

Independent equity suits for alimony or maintenance rest not in the divorce jurisdiction. They rest within the jurisdiction of ordinary suits in equity. Therefore, facts sufficient to warrant a divorce need not be established. It is sufficient to show a persistent unjustifiable course of conduct on the part of the husband whereby he fails to give to the wife the support and maintenance vouchsafed to her by law. If she has been unjustifiably aban-

doned, she is entitled to alimony, though the abandonment is not of sufficient duration to entitle her to a divorce. Whenever the wife is justified in living apart from the husband by reason of his desertion, cruelty or other improper conduct, she is entitled to alimony. In other words, wherever in her situation there remains with her legal right to the credit of the husband for necessary support and maintenance, she may have a decree in equity based on that legal right. In determining the right of the wife to alimony in an independent equity suit therefor, the test should be: Is she entitled at law to charge the husband with necessaries? But we must concede that the courts have not always observed this test. In the decision of causes such as we are considering, too many courts have been prone to think of the rules of statutory divorce rather than to follow the principles of generally accepted law governing the right of a wife to necessaries on the credit of her husband. Since the jurisdiction arises out of that right, it is inconsistent to cast consideration of the same wholly aside in exercising the jurisdiction.

It is beyond the purview of this article to review the present status of the law as to the right of the wife to carry with her the credit of the husband for necessaries. That may to an extent have been influenced by a general and enlightened trend in divorce legislation, but the substantive law of the subject is independent and distinct from the law of divorce.

Frequently it has been said that independent equity suits for alimony without divorce follow analogies drawn from the divorce jurisdiction. In principle this is not correct. Such suits have in fact no relation to the divorce jurisdiction, and, as we have seen, do not find standing therein. They are suits for the enforcement of legal obligations, and are in procedure and other respects analogous to ordinary equity suits for the enforcement of legal demands. Analogies to be followed in them should be drawn from ordinary equity suits, not from suits under divorce statutes. For instance, the venue of a suit for maintenance without divorce should in nowise be controlled by the statute in relation to jurisdiction in divorce suits. The place of suit is governed by the laws applicable to ordinary suits for the vindication of legal or equitable rights. And for like reason, the require-

ments of divorce statutes for a particular period of residence or a particular place of domicile, as requisite to right of suit, do not apply.

Decisions are found giving *pendente lite* suit money and alimony in independent equity causes seeking separate maintenance. If such procedure is allowable, warrant for it is not properly drawn from divorce statutes. Perhaps, under general equity powers, like the award of a preliminary order in an injunction case, the procedure is in some cases warranted.

The decree in an independent equity suit for maintenance can not be for a separation. That would render it equivalent to a divorce from bed and board. A court of equity has no such power. The decree should be simply for the separate support of the wife by the husband while they remain apart. In terms it should be that the husband pay the alimony until he will take back his wife and voluntarily perform the legal obligation that rests on him for her maintenance in the marital relation. If the husband offers in good faith to receive the wife again into his household and properly to discharge the marital obligation due from him to her, the wife's cause of action for separate maintenance ceases. Herein again is a distinction from divorce proceedings.

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